Supreme Court, U.S.
FILED
DEC 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-789

In the Supreme Court

OF THE

United States

OCTOBER TERM 1986

AMERICAN MULTI-CINEMA, INC.,
Petitioner,

vs.

SYUFY ENTERPRISES,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 28-1 STATEMENT

Respondent Syufy Enterprises ("Syufy") is a partnership. Syufy has no corporate parent, subsidiary or affiliate.

COUNTERSTATEMENT OF THE CASE

The petition asks this Court to consider AMC's claim that Syufy conspired to monopolize the motion picture exhibition market in San Jose, California. The irony of AMC's petition stems from the fact that it was AMC—not Syufy—who sought to conspire to monopsonize the San Jose market because AMC found that market too competitive for its liking. [RT 295, 2154-5, 2203-5] AMC President Durwood had proposed to Syufy and other theatre owners that they join him in a nationwide "cooperative" of exhibitors (codename "Mr. Cooper") who would band together and secretly allocate films among themselves in a "steamroom" rather than bid against one another. [RT 1271-4, 1898, 1903-4, 1922-4, 2164, 2169; PX 45.21] Durwood proposed to use the intensely competitive San Jose market as a model for

his cartel. [RT 1993, 2154-5, 2169, 2954] For these reasons and others, in denying injunctive relief the trial judge labeled AMC an "emergent monopolist" who was "a considerable threat to open competition in the San Jose market" and who, if "freed from any meaningful competition by Syufy, would become the unlawful, dominant force, the 'head gorilla,' in the market." [CR 360 at 5-6] *Syufy Enterprises v. American Multi-Cinema, Inc.*, 1983-82 Trade Cases ¶ 65,740 at p. 69, 779 (N.D.Cal. 1983).

Syufy flatly rejected AMC's illegal overtures. [RT 1922-4] Having failed to become the "head gorilla" in a conspiracy to monopsonize the fiercely competitive San Jose market [RT 1898, 1922-4, 1986, 1993, 2203-5], AMC turned around and accused Syufy of entering such a conspiracy with the motion picture distributors. [CR 8]

As the Court can see from AMC's Statement of the Case, however, AMC is still searching for a sound legal and economic theory to explain the surprise jury verdict it received on its counterclaim five years ago. Thus, AMC states that Syufy possessed a market share over 90% in 1973 and that it shrank to 70% as a result of Syufy's exclusionary, monopolistic conduct. [Petition at pp. 2-3] And although AMC claims that its "Oakridge and Saratoga theatres offered the distributors a superior alternative to the obsolete Syufy domes" [*Id.* at p. 4], the distributors for some unfathomable reason passed up this "superior alternative" and cut their own throats by conspiring to create a monopsony in their "obsolete" customer. With all due respect, Syufy submits AMC's conspiracy to monopolize claim simply does not make economic sense, never has made economic sense and, having been dismissed by the Court of Appeals, is unworthy of this Court's attention. *Cf. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, ____ U.S. ____, 106 S.Ct. 1348, 1356-7, 1360 (1986).

AMC would have this Court believe that exclusive licenses are an aberration, a method of film distribution unique to San Jose resulting from Syufy's coercive conspiracy with the distributors.[1]

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[1] The petition boldly states, without citation to any record evidence, that Syufy "coerced the distributors to act against their best economic interests." [Petition at p. 4] Perhaps AMC believes this Court is so far

As the record below makes clear, however, the impression AMC seeks to create is a false one. The whole San Francisco Bay Area revealed a pattern of exclusive runs, including San Francisco, Berkeley and Marin County, zones in which Syufy was not a factor. [RT 2659, 2666, 2668, 2399, 1126-9] Indeed, distributor McCafferty, whom AMC relied upon so heavily at trial and here, admitted that his company licensed exclusive runs in San Francisco, Denver, San Diego and Seattle where Syufy was not present to "coerce" the distributors [RT 2494] and the contemporaneous business records proved that numerous film licenses were offered to San Jose exhibitors by McCafferty's company (and the other distributors) on an exclusive basis only. [DX 5896-6731, 7036-7172] Even AMC's expert witness and its Senior Vice Presidents admitted that Syufy's exclusive licenses ("clearances") over AMC's San Jose theatres only a few miles away were, in fact, reasonable. [RT 3319-21, 2999-3000, 2238-9]

Hence the "evidentiary" predicate for the issues AMC brings to this Court is a hollow one; there was no direct evidence of an illegal conspiracy and no such inference could be drawn from the record. For this reason, the district judge granted a directed

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removed from the record that AMC can say anything to further its cause (regardless of whether it is true) because, at trial, AMC President Durwood sang a far different tune: Durwood called his own company, the third largest exhibitor in the country, relatively "teensy" when compared to any major distributor, he described the largest circuit as nothing more than a "fly in the soup" of the mighty film companies and railed against the latter's ability to force exhibitors to engage in blind bidding. [RT 1810-12, 1677] Nowhere does AMC suggest where "teensy" Syufy obtained the power to coerce any distributor to forego the allegedly "superior alternative" outlets offered by AMC in San Jose. Nor does AMC explain why the distributors licensed exclusive runs to San Jose exhibitors other than Syufy. [*See* DX 5896-6731 and 7036-7172] In fact, rather than establishing that the distributors were coerced into conspiring to grant exclusive licenses in San Jose against their economic interests, the petition proves just the opposite: as AMC tells the Court, with exclusive runs San Jose (despite its relatively small population) is one of the four largest grossing theatre markets in the country. [Petition at p. 2] *See Matsushita*, 106 S.Ct. at 1360-62 (where it would be economically irrational to enter conspiracy and conduct is consistent with plausible explanation, proof of conspiracy is lacking).

verdict against AMC's Sherman Act § 1 claim. [RT 3594-5] That ruling is now final and dispositive here; the Court should not entertain this petition which has no foundation in fact.

REASONS FOR DENYING THE WRIT

I

AMC'S CONSPIRACY TO MONOPOLIZE CLAIM IS BARRED AND THE PETITION IS THEREFORE MOOT

AMC's counterclaim charged Syufy with participating in a Sherman Act § 1 conspiracy with unnamed film distributors to restrain trade and a Sherman Act § 2 conspiracy with the film distributors to monopolize trade in the motion picture industry. [CR 8] Although the two antitrust conspiracy claims under the Sherman Act are distinct, they obviously share as a common element proof of conspiracy. AMC strenuously urges this Court to review the law applicable to its § 2 conspiracy claim but inexcusably fails to inform the Court that AMC's § 1 conspiracy claim was adjudicated adversely to it; the now-final determination that Syufy was not engaged in any conspiracy with any film distributors is binding upon AMC and renders this petition moot.

As Professors Areeda and Turner explain in their treatise, the § 2 conspiracy prohibition is "redundant" of § 1, since the latter offense is more easily proven: "Any arrangement that could be considered a combination or conspiracy to monopolize must necessarily also be an unreasonable restraint of trade offending § 1." P. Areeda and D. Turner III *Antitrust Law* at 358. *See also Alexander v. National Farmers Organization*, 687 F.2d 1173, 1193 (8th Cir. 1982). Dismissal of a lesser § 1 conspiracy charge necessarily mandates dismissal of the greater § 2 conspiracy claim. *Id.*; *Zenith Radio Corp. v. Matsushita Elec. Ind. Co., Ltd.*, 513 F.Supp. 1100, 1319-21 (E.D. Pa. 1981), *rev'd*, 723 F.2d 238 (3d Cir. 1983), *rev'd*, 106 S.Ct. 1348 (1986); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 118 (3d Cir. 1980), *cert. den.*, 451 U.S. 911 (1981).

On Syufy's motion for directed verdict [RT 3564], the district judge clearly dismissed AMC's § 1 claim that Syufy was engaged

with film distributors in a conspiracy to restrain trade for AMC's failure to prove the alleged conspiracy. [App. B-7; RT 3586, 3588, 3594-5][2] That directed verdict was incorporated in the district court's judgment. [CR 282] AMC took no appeal from the adverse portion of the judgment and, therefore, that judgment represents a final adjudication of the conspiracy issue. Insofar as AMC asks this Court to revitalize its allegations of illegal conspiracy for the purposes of resurrecting its § 2 conspiracy to monopolize claim, it is barred by the doctrine of *res judicata*. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 37-41 (1950); *Hurley v. Beech Aircraft Corp.*, 355 F.2d 517, 522 (7th Cir. 1966), *cert. den.*, 385 U.S. 821 (1966) (couched in terms of collateral estoppel); *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 461 F.Supp. 1046, 1051 (N.D. Cal. 1978), *aff'd*, 694 F.2d 1132, 1136 n. 6 (9th Cir. 1982). *See also Reed v. Allen*, 286 U.S. 191, 197-9 (1932); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398-401 (1981).

At this point in the proceedings, the questions raised by AMC's petition are of academic interest only. The conspiracy to monopolize claim is dead, a victim of the well-entrenched rules of issue preclusion as well as AMC's lack of evidence. Accordingly, the petition should be denied as moot.

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[2] Although the Ninth Circuit disagreed [A-17 n. 14], it appears from the trial transcript that the district judge intended to grant a directed verdict on AMC's § 2 conspiracy claim in addition to AMC's Clayton Act § 3 tie-in claim and its Sherman Act § 1 conspiracy claim. [*See* RT 3594-5] A § 2 conspiracy instruction was given to the jury [RT 3657-8] but the parties nonetheless acted as if that claim had been eliminated. Thus, AMC's brief on the post-trial motions nowhere mentions the conspiracy to monopolize claim [CR 294] and the district court's order denying the motions ignored it entirely. [App B1-14] Indeed, the opinion states, "On January 7, 1982, . . . AMC's Section 2 claim that Syufy had a monopoly and attempted to monopolize the exhibition of major first-run films in the San Jose zone, were submitted to the jury." [App. B-18] The confusion over the record, standing alone, should cause this Court to deny the petition. *See Kimbrough v. United States*, 364 U.S. 661 (1961); *Mitchell v. Oregon Frozen Foods Co.*, 361 U.S. 231 (1960).

II

HEARING THE PETITION ON THE MERITS COULD NOT ALTER THE LOWER COURT'S MANDATE THAT A NEW TRIAL BE HELD AND THIS COURT THEREFORE SHOULD NOT WASTE ITS RESOURCES

AMC argued four theories of § 2 liability to the jury. [App. A-2] In vacating the district court's judgment, the Court of Appeals explained the evidence was inadequate to support the general verdict on two of those four theories, the conspiracy to monopolize theory and the drive-in theatre leveraging theory. [App. A-2, 11-13, 16-19, 23] AMC raises the first of the circuit court's adverse rulings by its petition but not the second (which is now final). Hence the rule of *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962) comes squarely into play in considering whether this Court should grant the petition: where—as here—"one theory of liability upon which the general verdict may have rested" has been erroneously submitted to a jury, "the verdict cannot be upheld" and "it is unnecessary . . . to explore the legality of the other theories."[3]

The petition would have this Court squander its precious time to study AMC's conspiracy to monopolize theory of liability although such efforts could not dispose of this litigation; a new trial is mandated by *Sunkist* without regard to AMC's conspiracy claim because the monopoly leveraging theory of liability was improperly given to the jury. Since the judgment of the Court of Appeals rests comfortably and independently upon a final ruling not challenged in this Court, the petition should be denied. *See The Monrosa v. Carbon Block Export, Inc.*, 359 U.S. 180, 183-4 (1959).

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[3] *See also United N.Y. & N.J. Sandy Hook Pilots Assn. v. Halecki*, 358 U.S. 613, 619 (1959); *Doherty v. American Motors Corp.*, 728 F.2d 334, 344 (6th Cir. 1984); *Ely v. Blevins*, 706 F.2d 479, 480 (4th Cir. 1983); *Avins v. White*, 627 F.2d 637, 646 (3d Cir. 1980) *cert. den.* 449 U.S. 982 (1980), all applying the same rule. *Sunkist Growers* and its progeny, which were not even cited to this Court by AMC in connection with the third and fourth questions presented by the petition, plainly reveal the insubstantial nature of those two questions.

III

THE COURT OF APPEALS' DECISION IS CORRECT

A. The Court Of Appeals Applied The Correct Standard Of Proof For Antitrust Conspiracies

The first issue raised by the petition is a false one. AMC suggests the Ninth Circuit created a higher burden of proving conspiracy in a Sherman Act § 2 case than exists for § 1 cases. But the Court of Appeals did no such thing; it followed well-established, virtually identical standards of proving conspiracy under either § 1 or § 2.

In *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946), in a § 2 context, this Court provided its classic description of the quantum of proof necessary to prove conspiracy:

> "Where the circumstances are such as to warrant a jury in finding that the conspirators had a *unity or purpose* or a *common design and understanding*, or a *meeting of minds in an unlawful arrangement*, the conclusion that a conspiracy is established is justified." (emphasis added)

The standard of proof is no different in a § 1 vertical conspiracy case as AMC seems to have alleged here [App. A-17]; the plaintiff must prove the parties in the chain of distribution "had a *conscious commitment to a common scheme* designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764, 769 (1984) (emphasis added). In this case, the Court of Appeals dismissed AMC's § 2 claim that Syufy conspired with the film companies to monopolize the San Jose market because there was no evidence "that any of the distributors shared with Syufy a *common purpose* in monopolizing the hardtop theatre market in the San Jose area." [App. A-18] The lower court's holding plainly comports with *American Tobacco* and *Monsanto* and it need not be reviewed by this Court.[4]

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[4] Obviously, consideration of the type of evidence needed to prove a conspiracy to monopolize is closely linked to the question of the alleged conspirators' intent. If the film distributors neither share an exhibitor's monopolistic intent nor even know of it, both the "conspiracy element"

Contrary to what AMC would lead this Court to believe, the Ninth Circuit considered the "knowledge and acquiescence" test for § 1 conspiracy cases intimated by *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) but the Court of Appeals refused to create a lesser burden for proving conspiracy in § 2 cases by eliminating the need for proof of the alleged coconspirators' knowledge or awareness of the illegal scheme. [App. A-18] *Cf. Albrecht v. The Herald Co.*, 390 U.S. 145, 149 (1968) (§ 1 "combination" found where agent aware of illegal plan and materially aids it); *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1072-4 (3d Cir. 1978). The Ninth Circuit's ruling was plainly correct. As this Court's recent decision in *Monsanto* made clear, some unity of purpose is essential to an antitrust conspiracy. 465 U.S. at 764, 768. Since AMC adduced no evidence that either the "distributors shared with Syufy a common purpose" or that the distributors even knew of Syufy's aim [App. A-18], the § 2 conspiracy to monopolize claim (like the § 1 conspiracy claim before it) was properly dismissed.

B. The Court Of Appeals Correctly Required Proof Of Some Coconspirators' Specific Intent To Monopolize

In *American Tobacco*, 328 U.S. at 809, this Court indicated that a Sherman Act § 2 conspiracy to monopolize claim requires proof of the conspirators' intent "to exclude actual or potential competition from the field." *See also United States v. Jerrold Electronics Corp.*, 187 F.Supp. 545, 567 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961) (conspiracy to monopolize requires a finding of specific intent by the persons involved). The lower federal courts have unanimously followed this Court's lead and it is now well-settled that an essential element of the § 2 conspiracy offense is proof of defendants' specific intent to monopolize the market.[5]

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and "specific intent element" of the conspiracy to monopolize cause of action are absent. *See* Section III B, below.

[5] *See, e.g., Great Escape, Inc. v. Union City Body Co. Inc.*, 791 F.2d 532, 540-2 (7th Cir. 1986); *J.T. Gibbons v. Crawford Fitting Co.*, 704 F.2d 787, 796 (5th Cir. 1983); *Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432, 438 (10th Cir. 1983) *cert. den.* 464 U.S. 866 (1983);

The lower court's decision fully comports with these precedents. Recognizing there was no evidence that any film distributor "shared with Syufy a common purpose in monopolizing the hardtop theatre market in the San Jose area" or even that any distributor had any reason to know "that Syufy would use the film licenses for monopolistic purposes," the Court of Appeals held the requisite proof of the alleged coconspirators' specific intent to monopolize was lacking. [App. A-18] Although AMC does not dispute the Ninth Circuit's description of the record, AMC contends such proof of the film companies' intent is unnecessary to its conspiracy to monopolize claim; AMC argues Syufy's intent alone should suffice.

AMC's petition improperly jumbles together the three Sherman Act § 2 offenses of monopolization, attempt to monopolize and conspiracy to monopolize. Monopolization claims do not require proof of defendant's specific intent. *American Tobacco*, 328 U.S. at 814; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626 (1953). Section 2 attempt claims require proof of one firm's specific intent to monopolize a market. *Times-Picayune*, 345 U.S. at 626. Conspiracy to monopolize claims require proof of two or more conspirators' specific intent to monopolize. *American Tobacco*, 328 U.S. at 809; *Richter Concrete*, 691 F.2d at 827. If § 2 conspiracies did not demand proof of more than one actor's specific intent to monopolize, as the Court of Appeals required, the conspiracy to monopolize offense would be redundant of the offense of attempted monopolization and easier to prove than conspiracies to restrain trade. *See Monsanto*,

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Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 827 (6th Cir. 1982); *Hospital Building Co. v. Trustees of Rex Hospital*, 691 F.2d 678, 690 (4th Cir. 1982) *cert. den.* 464 U.S. 980 (1983); *Alexander v. National Farmers Organization*, 687 F.2d 1173, 1182 (8th Cir. 1982); *Carpet Seaming Tape Licensing Corp. v. Best Seam, Inc.*, 616 F.2d 1133, 1141 (9th Cir. 1980) *cert. den.* 464 U.S. 818 (1983); *Hill Aircraft and Leasing Corp. v. Fulton County*, 561 F.Supp. 667, 677 (N.D. Ga. 1982), *aff'd*, 729 F.2d 1467 (11th Cir. 1984); *V&L Cicione, Inc. v. C. Schmidt & Sons, Inc.*, 403 F.Supp. 643, 651-2 (E.D. Pa. 1975), *aff'd*, 565 F.2d 154 (3d Cir. 1977). *See also* L. Sullivan *Antitrust* at 132.

465 U.S. at 764; P. Areeda and D. Turner III *Antitrust Law* at 358-9.[6]

If Syufy alone had the specific intent to monopolize the San Jose market, then AMC may pursue its attempt to monopolize claim at trial on remand and, if that attempt was successful, then AMC may press its monopolization claim. But without proof that the distributors conspired with Syufy and that those distributors shared Syufy's specific intent to monopolize the market, AMC's § 2 conspiracy claim was properly dismissed.

CONCLUSION

For all of the reasons stated, Syufy respectfully submits this Court should deny AMC's petition for certiorari.

DATED: December 15, 1986.

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[6] Many of the passages from *Paramount* and *Griffith* quoted or cited by AMC relate to monopolization claims and, therefore, are not on point. None of them state that a claim for conspiracy to monopolize may be established without proof of the conspirators' specific intent. Mere proof of a series of exclusive film licenses in San Jose could not supply the missing element of that cause of action. *Hill Aircraft & Leasing Corp. v. Fulton County*, 561 F.Supp. 667, 677 (N.D. Ga. 1982), *aff'd*, 729 F.2d 1467 (11th Cir. 1984); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 149-50, 153-4 (3d Cir. 1981) *cert. den.* 455 U.S. 1019 (1982).